

Message Text

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TAGS: ETRD, MTN, EC

SUBJECT: US-EC BILATERAL ON GOVERNMENT PURCHASING

1. FOLLOWING IS FOURTH OF A SERIES OF PAPERS ON
OUTSTANDING ISSUES IN PROCUREMENT CODE NEGOTIATIONS. THESE
PAPERS ARE BACK-UP TO DRAFT POSITION PAPER SENT SEPTTEL
FOR YOUR COMMENTS.

DISPUTE SETTLEMENT

2. U.S. POSITION

THE SUCCESS OF A PROCUREMENT CODE WILL, TO A
CONSIDERABLE DEGREE, DEPEND ON THE ABILITY OF THE POTENTIAL
SUPPLIER AND THE PROCURING GOVERNMENT TO RESOLVE ANY
DISPUTES BETWEEN THEMSELVES. IN THE CONSEQUENTLY FEW
REMAINING INSTANCES WHERE DISPUTES ESCALATE TO A BILATERAL
AND/OR A MULTILATERAL LEVEL, WE PROPOSE THE FOLLOWING:

(A) AFTER A REQUEST FOR BILATERAL CONSULTATION, THE
RESPONDING GOVERNMENT SHALL PROVIDE ALL INFORMATION

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NECESSARY TO ILLUMINATE THE PROBLEM; (B) IF THE PROBLEM IS

NOT SETTLED AT A BILATERAL LEVEL, THE COMPLAINING GOVERNMENT MAY REFER THE PROBLEM TO THE SUPERVISORY BODY OF SIGNATORY GOVERNMENTS FOR THAT BODY'S GOOD OFFICES EFFORT IN EFFECTING CONCILIATION, AND (C) FAILING CONCILIATION, THE COMPLAINING GOVERNMENT WOULD HAVE THE RIGHT, IF IT SO WISHES, TO HAVE THE DISPUTE SUBMITTED TO THE JUDGEMENT OF A PANEL OR SUBCOMMITTEE OF INDEPENDENT, IMPARTIAL EXPERTS, THE DECISION OF WHICH COULD INCLUDE SANCTIONS.

3. EC POSITION

UNTIL THE DECEMBER 1975 MEETING OF THE TCWP THE EC MAINTAINED THAT SOLUTIONS AT THE MULTILATERAL LEVEL COULD ONLY BE OBTAINED THROUGH THE SUPERVISORY BODY OF ALL SIGNATORY GOVERNMENTS ALTHOUGH IT DID NOT FORECLOSE USE OF A PANEL OR SUBCOMMITTEE FOR FACT-FINDING PURPOSES. AT THE DECEMBER MEETING, THE COMMUNITY TABLED A NEW TWO-TRACK APPROACH. THE PROPOSAL PROVIDES FOR SUBMISSION OF A DISPUTE TO BINDING ARBITRATION IF BOTH PARTIES AGREE, UNLESS A QUESTION QUOTE OF A SERIOUS NATURE OR GENERAL SCOPE END QUOTE IS INVOLVED. WHEN DISPUTES ARE NOT (OR CANNOT BE) SUBMITTED FOR ARBITRATION, THEY COULD BE SUBMITTED TO A STANDING SUBCOMMITTEE OF SIX CODE MEMBERS. THE SUBCOMMITTEE WOULD REVIEW THE CASE AND SUBMIT ITS RECOMMENDATIONS TO THE COMMITTEE OF ALL SIGNATORY GOVERNMENTS.

4. POSSIBLE SOLUTION

EARLY IN 1975, AFTER DISCUSSION IN THE TCWP OF THE U.S. PROPOSAL FOR DISPUTE SETTLEMENT, THE PROPOSAL WAS MODIFIED TO PROVIDE FOR A VETO OF PANEL DECISIONS BY THE COMMITTEE OF SIGNATORY GOVERNMENTS. WE MADE THIS CONCESSION IN THE FACE OF A GENERALIZED CLAIM THAT INTERNATIONAL SOVEREIGNTY DEMANDED IT AND BECAUSE WE CONSIDERED THAT A HIGHLY VISIBLE VETO PROCEDURE WOULD NOT LIKELY BE USED TO OVERTURN A CORRECT PANEL DECISION. UNTIL THE EC INITIATIVE AT THE DECEMBER TCWP, NO FURTHER INITIATIVES WERE TAKEN ON THE DISPUTE SETTLEMENT ISSUE.

5. THE EC PROPOSAL, AS EXPLAINED AT THE LAST TCWP MEETING IS ONLY A MODEST DEPARTURE FROM PRIOR POSITIONS. IT DOES, HOWEVER, FORMALLY INTRODUCE FOR THE FIRST TIME TWO IMPORTANT CONCEPTS - THE POSSIBILITY OF ARBITRATION AND LIMITED OFFICIAL USE

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THE CONCEPT OF A "MONITORING GROUP" OF CODE SIGNATORIES (ALTHOUGH AT THE DECEMBER MEETING THE EC WAFFLED IN THE FACE OF OPPOSITION FROM OTHER COUNTRIES, AS TO WHETHER THEY WERE, IN FACT, THINKING OF A STANDING SUBCOMMITTEE SIMILAR TO THAT INVOLVED UNDER THE LTA).

6. WE ENVISAGE NO SATISFACTORY SOLUTION SHORT OF THE EXISTING U.S. PROPOSAL UNLESS (1) A RESTRICTED MONITORING COMMITTEE COMPOSED OF A PROPER BALANCE OF THE

MORE IMPORTANT COUNTRY REPRESENTATIVES CAN BE ACHIEVED
AND (2) PROVISION IS MADE FOR PANEL REVIEW, UNDER THE
AUSPICES OF SUCH A MONITORING GROUP OF QUESTIONS OF FACT
AND LAW. KISSINGER

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